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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

A.V. COSTANTINI,
dba UNITED TRAVEL SERVICE,
dba WARDS TRAVEL SERVICE,

Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
DOES I THROUGH XC.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In Propria Persona

## QUESTIONS PRESENTED

1. Whether the court in dismissing the action viewed the material facts in the light most favorable to the party opposing a motion to dismiss.

2. Whether the existence of fraudulent concealment precludes the application of the doctrine of res judicata.

3. Whether the party moving to dismiss an action, and the court, are required to abide by the Rules of the Court requiring affidavits or declarations to support factual representations.

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 2 |
| JURISDICTION | 3 |
| STATUTES INVOLVED (RULES OF COURT) | 3 |
| STATEMENT | 4 |
| A. The Facts | 4 |
| B. Proceedings Below | 11 |
| REASONS FOR GRANTING THE WRIT | 13 |
| CONCLUSION | 19 |
| APPENDIX A | A1 |
| APPENDIX B | B1 |
| APPENDIX C | C1 |

## TABLE OF AUTHORITIES

### CASES


| | Page |
|---|---|
| Adickes v. Kress & Co., 398 U.S. 144 | 14 |
| Anderson v. Yungkau, 329 U.S. 482 | 19 |
| First National Bank of Arizona v. City Services Co. 391 U.S. 253 | 14 |
| Magee v. Manhatten Life Insurance Co. 92 U.S. 93 | 15 |
| Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 U.S. 603 | 18 |
| Securities & Exchange Com. v. Capital Gains Research Bureau, Inc., 375 U.S. 180 | 16 |


### RULES OF COURT


| | |
|---|---|
| United States District Court of the Northern District of California Local Rules- | |
| -Rule 220-2 | 17 |
| -Rule 220-8 | 17 |

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No._____

A.V. COSTANTINI, etc.

Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
DOES I through XC,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO
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A.V. Costantini, plaintiff and petitioner in the proceedings below, repectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

1. Order of the United States Court of Appeals for the Ninth Circuit dated July 22, 1982 affirming the judgment of the United States District Court for the Northern District of California dismissing plaintiff's complaint as barred by res judicata. (Appendix at A1) (not officially reported)

2. Order of the United States District Court for the Northern District of California dismissing plaintiff's complaint as barred under the doctrine of res judicata. (Appendix at B1) (not officially reported)

## JURISDICTION

The judgment of the court of Appeals was entered on July 22, 1982 (Appendix at A1).

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

## STATUTES INVOLVED (RULES OF COURT)

United States District Court of the Northern District of California Local Rules 220-2 and 220-8.

## STATEMENT

### A. The Facts

A.V. Costantini ("Dr. Costantini") entered into the travel agency business in 1963 and during the ensuing decade opened branch offices in a number of the shopping centers located in the San Francisco Bay Area. In order to be able to issue interstate and international airline tickets, each newly opened travel office required separate approval by the Air Transport Association of America (ATC) and the International Air Transport Association (IATA). Each newly opened office required the employment of an experienced manager and certification that the ownership of the branch office was the same as that of the home office.

In 1972, Dr. Costantini began a nationwide expansion into the 475 Montgomery Ward stores by establishing travel offices under the name of Wards Travel

Service. The first Wards Travel Service office was opened and secured approvals from ATC and IATA. In March 1973, a second Ward branch office was opened, and shortly thereafter a third. ATC refused to approve these offices claiming that the managers lacked experience but ATC's reasons were overshadowed by its simultaneous written representation that the airline industry was being placed in a position of serious jeopardy as a result of Dr. Costantini's plan for establishing travel agencies in the Montgomery Ward stores. IATA failed to advise appellant as to any reason it was employing in its failure to approve these offices. ATC and IATA are mandated to provide applicants with all reasons for not approving a branch office pursuant to the provisions of Civil Aeronautics Board Orders No. E-14012, June 10, 1969 and No E-16459, dated March 1, 1961; such that the appli-

cant may correct deficiencies in order to be approved.

The conflict was aggravated on March 27, 1973, when a TWA representative informed one of Dr. Costantini's branch office managers that ATC was never going to approve any of the pending branch offices and that the manager should sever his relationship with Dr. Costantini and seek employment elsewhere.

On April 18, 1973, Dr Costantini, in his capacity as an appointed TWA agent, wrote to his principal, TWA, demanding that TWA provide any information it had in its possession upon which TWA knew that ATC would never approve the newly opened offices. TWA's response was that Dr. Costantini was charged with selling illegal airline tickets and that the office managers lacked experience. ATC and IATA had not given Dr. Costantini notice that the reason they were not ap-

proving the newly opened offices was that he was charged with selling illegal airline tickets. Dr. Costantini has never sold illegal tickets nor has he ever been charged of doing so. And, if the newly opened offices lacked experienced managers at the time they were being inspected by ATC and IATA, it was due to TWA causing these managers to quit working due to the fear created by TWA that they were engaged in the sale of illegal airline tickets.

As TWA's agent in the fiduciary relationship which existed between TWA and Dr. Costantini, Dr. Costantini relied upon TWA's representation that all of the information in its possession had been turned over to him. There was no rational reason to suspect that TWA, as Dr. Costantini's principal, would falsify its representations being made to him. Even if

suspicion were to have existed, it would have been dispelled by the fact that discovery procedures (ATC and TWA induced Dr. Costantini to dismiss his initial action against them [C 74 0365 SAW] by indicating that Dr. Costantini would be provided discovery as part of an attempt to resolve the controversy through an arbitrational tribunal), failed to elicit the key documents upon which the present action is based. It was represented that ATC provide Dr. Costantini with all of the documents in their possession relative to why ATC was not approving the branch offices being located in the Montgomery Ward Stores. Dr. Costantini's attorney traveled to ATC's offices in Washington, D.C. where he deposed ATC officers and employees and obtained "all" of the documents ATC represented that it had in its possession. The key documents upon which this action is based were <u>not</u> among

those documents. The document surfaced when the Civil Aeronautics Board's investigators made an unannounced investigatory visit to ATC offices and proceeded to copy the entire United Travel Service files maintained by ATC. It was only when Dr. Costantini exercised his rights under the Freedom of Information Act that the very existence of the secretive and false communication from TWA to ATC was first learned. What TWA, and ATC, had failed to disclose to Dr. Costantini and his attorney was that TWA had written to the Civil Aeronautics Board and to ATC that Dr. Costantini was not the true owner of his branch offices and that these offices were owned by the branch manager:

> "the fact that he has been requesting approval of his agency locations as branches..but is reported to be selling the branches as franchises and a a percentage of the profits."

Dr. Costantini has never sold his branches as franchises and the ownership of his branches was at all times the same as that of the parent office.

As a result of TWA's falsifications before the Civil Aeronautics Board, that Board terminated its investigation of TWA relative to the conflict.

As a result of TWA's false representations to ATC, Dr. Costantini was effectively prevented from expanding into the 475 Montgomery Ward Stores nationwide.

As a result of TWA's fraudulent concealment of the lies it was secretively spreading regarding Dr. Costantini was unable to prevail in prior litigation.

The fact that TWA and Dr. Costantini were in direct competition with each other in the sale of air transportation and related services cannot be overlooked.

If Dr. Costantini had not exercised

his right under the Freedom of Information Act, none of the above fraud would have been discovered.

B. Proceedings Below

Following the discovery of the existence of fraudulently concealed documents indicating that TWA had made false statements resulting in the loss of the Montgomery Ward License Agreement, Dr. Costantini filed the instant complaint alleging unfair interference by TWA with Dr. Costantini's business relationship with ATC and IATA. The original complaint was filed on February 8, 1980 and amended, as a matter of course,on February 25,1980; the amended complaint setting forth all of the necessary facts required to demonstrate to the court that TWA had fraudulently concealed the material facts upon which the complaint was based.

On April 16, 1980, the district court granted TWA' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the action was barred by the doctrine of res judicata. TWA's motion was not accompanied by affidavits or declarations as are required by the rules of the court. (Appendix at B1)

Dr. Costantini filed his notice of appeal on May 13, 1980 in the United States Court of Appeals for the Ninth Circuit.

On July 22, 1982, the Court of Appeals for the Ninth Circuit affirmed the district court's judgment dismissing Dr. Costantini's complaint as barred by res judicata. (Appendix at A1)

## REASONS FOR GRANTING WRIT

### I. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE ADICKES CASE, AND OTHER CASES IN THIS COURT, THAT MATERIAL FACTS MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE OPPOSING PARTY

The material fact in this case is that Trans World Airlines, Inc., as the principal in the fiduciary relationship existing with its agent, A.V. Costantini, falsified the representations which were made to A.V. Costantini. The key evidence was concealed during earlier discovery procedures and was only recently discovered when non-public investigatory files of the Civil Aeronautics Board were obtained pursuant to palintiff's Freedom of Information Requests.

As the moving party, Trans World Airlines, Inc. had the burden of showing the absence of a genuine issue as to the material facts and when it failed to do so, the court erred in dismissing the

complaint. The materials lodged must be viewed in the light most favorable to the party opposing the motion to dismiss. Adickes v Kress & Co., 398 U.S. 144, 157.

The only burden shouldered by the party opposing summary judgment is to adduce specific facts which present an issue worthy of trial to resolve the parties differing versions of the truth. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-289.

## II. THE DECISION BELOW CONFLICTS WITH THE PRINCIPAL SET OUT IN THE MAGEE CASE, AND OTHER CASES IN THIS COURT, THAT FRAUDULENT CONCEALMENT OCCURS WHEN A PARTY SUPPRESSES SOMETHING WHICH IT IS BOUND TO DISCLOSE

The proceedings below ignored the fact that a fiduciary relationship existed between Trans World Airlines, Inc., and A.V. Costantini. As Trans World Airlines' agent, A.V. Costantini relied upon his principal's representation that all of

the facts had been provided to him. The truth of the matter, as A.V. Costantini recently learned through his Freedom of Information Request of confidential Civil Aeronautics Board records, is that Trans World Airlines wilfully and intentionally concealed material facts in its possession which were not only injurious to him but would have resulted in a judgment in his favor during the prior litigation. This Court has addressed this issue on at least three prior occasions:

> a concealment must, in order to be fraudulent, be wilful and intentional and a suppression of something which the party is bound to disclose, Magee v. Manhatten Life Insurance Co. 92 U.S. 93;
>
> the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false

representation, Tyler v. Savage, 143 U.S. 79;

fraud, in the sense of a court od equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another, Securities & Exchange Com. v. Capital Gains Research Bureau, Inc., 375 U.S. 180.

III. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE RIO GRANDE CASE THAT A DULY AUTHORIZED RULE OF THE COURT IS BINDING UPON THE COURT AND THE PARTIES.

In the proceeding below, the court did not abide by its own rules requiring Trans World Airlines to submit affidavits or declarations in support of the factual representations made in its motion to

dismiss A.V. Costantini's complaint.

Local Rule 220-2 of the United States District Court of the Northern District of California, then in effect, is clear:

"Each notice of motion shall be accompanied by affidavits or declarations under penalty of perjury.."

Local Rule 220-8 of the same court, then in effect, mandates:

"Factual contentions made in support of any motion shall be supported by affidavits or declarations."

The notice of motion and motion to dismiss of Trans World Airlines, Inc., were unsupported by the required affidavits or declarations. Most of the factual representations made by Trans World Airlines were simply false and could not be supported by affidavit or declaration without Trans World Airlines incurring the penalties of perjury. The

rational for the existence of rules of the court requiring affidavits and declarations is to insure that the court is presented truth and not the type of false statements made by Trans World Airlines, Inc.'s counsel in obtaining judgment in favor of his client at the expense of the plaintiff in this case. Truth is the only basis upon which final judgments shoud be based.

A duly authorized rule of the court has the force of law, and is binding upon the court as well as upon the parties to an action, and cannot be dispensed with the particular circumstanses of any particular case. Rio Grande Irrigation and Colonization Co. v. Gildersleeve, 174 U.S. 603. In this case, the Local Rules of the Court mandates that notice of motion and motions shall be accompanied by affidavits or declarations. The word

"shall" is ordinarily the language of command; and when a Federal Rule of Civil Procedure uses both "may" and "shall" the normal inference is that each term is used in its usual sense-the one act being permissive, the other mandatory. Anderson v. Yungkau, 329 U.S. 482.

## CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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October 18, 1982